

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 PORTLAND DIVISION

4
5 ANDREW CHOI,

6 Plaintiff,

7 vs.

8 REED INSTITUTE, doing business
as REED COLLEGE; and MARIELA
9 SZWARCBERG DABY, individually,

10 Defendants.

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) No. 3:17-cv-02064-MO
)

) July 20, 2018
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) Portland, Oregon
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14 TRANSCRIPT OF PROCEEDINGS

15 (Oral Argument)

16
17 BEFORE THE HONORABLE MICHAEL W. MOSMAN

18 UNITED STATES DISTRICT COURT JUDGE
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23 Court Reporter:

Ryan White, RMR, CRR, CSR/CCR
United States District Courthouse
1000 SW 3rd Avenue, Room 301
Portland, Oregon 97204
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1 (July 20, 2018; 2:00 p.m.)

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3 P R O C E E D I N G S
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5 THE CLERK: We are here today for oral argument in
6 case 3:17-cv-2064-MO, Choi v. Reed Institute, et al.

7 Counsel, please state your name for the record.

8 MS. NANAU: This is Daniela Nanau for the plaintiff,
9 Andrew Choi.

10 MR. BRAGUE: Kevin Brague on behalf of plaintiff,
11 Andrew Choi.

12 MS. RUNKLES-PEARSON: PK Runkles-Pearson on behalf of
13 Professor Mariela Szwarcberg Daby.

14 MS. BARRAN: Paula Barran on behalf of the Reed
15 Institute.

16 THE COURT: Thank you all for being here.

17 I'd like to take these sort of thematically. So we'll
18 start with claim 1 and 2 under Title 11 on the statute of
19 limitations issue, and I'll start each time with the moving
20 party.

21 MS. BARRAN: Thank you, Your Honor.

22 On the statute of limitations issue, there are some
23 things that we know from the complaint and that we know as a
24 matter of law. I don't think that there is any objection from
25 the plaintiff to our argument that this is a two-year statute.

1 The case law is clear. And as I read plaintiff's papers, they
2 concede that it is a two-year statute of limitations.

3 THE COURT: Right. You're just facing a tolling
4 argument. That's not a --

5 MS. BARRAN: Yes.

6 MS. NANAU: Your Honor, I hate to interrupt already,
7 but I can barely hear Ms. Barran. Could she maybe speak into a
8 microphone or something so that I can --

9 THE COURT: You can go ahead and be seated. That will
10 help.

11 MS. BARRAN: Thank you, Your Honor. It's just a
12 little uncomfortable sitting down in front of a judge during
13 argument.

14 Thank you.

15 THE COURT: So we were just saying the parties seem to
16 agree that there's a two-year statute of limitations, and so
17 I've directed Ms. Barran to just pick up the tolling argument
18 made by plaintiff.

19 Go ahead.

20 MS. BARRAN: So, Your Honor, the case law on equitable
21 tolling in this district and in this circuit is very clear.
22 First, it has to be an extreme case. Plaintiff asserts that
23 everything that is necessary to identify a tolling issue is
24 already in the complaint, but remarkably asks for discovery to
25 see whether or not there is anything to support the tolling

1 argument.

2 So assuming that the statements in the complaint are
3 intended to assert the tolling facts, first, we have to find
4 something that is extraordinary that makes this an extreme case.
5 That's entirely missing from this -- from the allegations of
6 this case.

7 Second, plaintiff has to establish that he was
8 prevented by Reed, in our case, by the Reed Institute, from
9 asserting a timely claim.

10 Plaintiff argues that in the opposition citing the
11 Willamette Tree case, *EEOC v. Willamette Tree*, and the facts of
12 that case are so inapposite that it's surprising that it even
13 shows up in plaintiff's argument. In *Willamette Tree*, the woman
14 who was an employee, who was a non-English speaker, had been
15 repeatedly raped by her supervisor, and was told that if she
16 told anybody about the rape he would kill her and kill her
17 family and kill her children. If she quit her job, he would
18 find her and harm her.

19 Those are the kinds of things that certainly would
20 keep somebody from bringing a timely claim. That's entirely
21 missing here.

22 In fact, if you look at the plaintiff's letter
23 arguments, he attaches to his complaint a letter that he wrote
24 to a group called CAT, which is the Committee on Advancement and
25 Tenure at Reed. This was his 2015 complaint to Reed, or his

1 2015 letter to Reed, on the subject of whether or not Professor
2 Daby should get a contract renewal, and in it he says straight
3 out that you may wonder why I never brought this up before. And
4 he gives two reasons; the first being that he was focused on his
5 unwavering loyalty to Professor Daby, and the second being he
6 was afraid of that jeopardizing his future academically.

7 That may have been a factor at some point during his
8 school years, but he had flunked out of Reed in January 2014 and
9 it took him close to four years to file this lawsuit.

10 So the focus for the Court is was there something that
11 Reed did that kept him from filing a timely lawsuit? And he
12 doesn't assert anything. He simply admits that he was loyal to
13 his former professor and that he didn't want to jeopardize his
14 academic career. His academic career was over when he flunked
15 out of Reed.

16 He doesn't really say that he didn't file the lawsuit.
17 What he says is it took him until 2015 to write a letter to
18 Reed. That's not the kind of conduct that this extraordinary
19 remedy or this extraordinary procedure of equitable tolling was
20 intended to cover.

21 The other cases that plaintiff cites in his memorandum
22 are similarly inapposite. One of them, the Alvarez case, was a
23 gentleman who actually had been imprisoned and tortured in a
24 foreign country, obviously he was being held incommunicado, and
25 he couldn't file his lawsuit timely either.

1 Other cases that they cite are a collection of things
2 where the government gave the wrong advice to a plaintiff, was
3 late in getting the right to sue later, which was a prerequisite
4 to filing suit. None of this is present here.

5 In fact, the plaintiff has not presented anything that
6 explains this extraordinary long period of time beyond the
7 running of the statute of limitations, almost two years after
8 the statute had expired.

9 The plaintiff also has to present evidence that it was
10 impossible for him to have filed his lawsuit on time, and that's
11 entirely missing as well. He was able to write a letter to his
12 professors, he was able to ask for an opportunity to come back
13 to Reed, he was able to write a long letter to the Committee on
14 Advancement and Tenure, which you see attached to the complaint.
15 He could certainly have filed a lawsuit.

16 Similarly, another requirement for equitable tolling
17 is that he have -- he preceded with due diligence to preserve
18 his rights, and there's no evidence in the complaint or anywhere
19 that he did that.

20 He wrote his letter to the committee in October of
21 2015. There's no indication of what was going on in the long
22 period of time from his flunking out of Reed to writing that
23 letter. And then as you can see from the dates on that exhibit,
24 he waited a whole month before he even posted it to Reed, and
25 then he waited another two years before he wrote another letter.

1 So from that, you have to wonder why equitable tolling
2 has even been mentioned.

3 Plaintiff argues, then, that what the Court should do
4 is take the period between his two letters -- he wrote a letter
5 in October 2015 and then there was a contact -- I'm sorry. The
6 letter and the contact.

7 So he wrote the one letter to the committee,
8 October 2015, and then the dean contacted him, June 2017, when
9 Professor Daby was standing for tenure, and plaintiff suggests
10 that you simply take that time out of the equation and treat
11 that as the tolling period. There's no law cited for that
12 suggestion.

13 But even if you do the math, he still runs well
14 outside of the statute of limitations. If you -- I actually
15 calculated the days this morning, and he's still a number of
16 days, like 86 days too late in filing the lawsuit, even if you
17 give him what he asks for which is to toll that period between
18 the two letters.

19 THE COURT: All right. Thank you.

20 Your response?

21 MS. NANAU: Plaintiff's response, Your Honor, is that
22 Defendant Reed College is not giving due credence to the facts
23 alleged which do allege an extraordinary situation.

24 Mr. Choi went through four years of Reed College,
25 which were by and large successful until the last year. And

1 then he encountered a series of problems, most of them having to
2 do with the failure of his thesis -- of his thesis advisor,
3 Defendant Szwarcberg Daby, to shepherd him through the thesis
4 process, and the reasons why that occurred are at issue in this
5 lawsuit.

6 THE COURT: Those facts don't help me with the statute
7 of limitations argument. Stick with what will help me decide
8 whether there was tolling here.

9 MS. NANAU: Okay. Well, then let me just focus on
10 this.

11 When Mr. Choi's first manuscript of his thesis, which
12 had been approved, was then immediately -- the approval was
13 revoked when he couldn't attend his oral examination because of
14 a medical emergency, he requested a series of accommodations
15 that were never -- that were never granted and, in fact, the
16 process of requesting the accommodations --

17 THE COURT: Ms. Nanau, yet again you're telling me
18 things that don't help me at all on the tolling argument.

19 When do you believe the claim first accrued?

20 MS. NANAU: I think the claim first accrued when Reed
21 College denied his requests for accommodation.

22 THE COURT: All right. And then what are you relying
23 on for tolling over the next ensuing more than four years?

24 MS. NANAU: The plaintiff provided Reed College with
25 notice of both the failure of Defendant Szwarcberg Daby to

1 accommodate him, and of their very problematic personal
2 relationship that affected the thesis process in 2015. He did
3 so at the behest of two professors, one of whom was chair of the
4 department at that time. Because Reed College doesn't adhere to
5 its own policies or procedures, as this case will amply
6 demonstrate if we're allowed to move forward with discovery --

7 THE COURT: Let me ask you this. What's the dominant
8 fact you rely on that shows Reed College did something to
9 prevent the filing of this lawsuit?

10 MS. NANAU: I think -- I think it's very difficult,
11 Your Honor, to slice and dice the evidence and give you an
12 answer unless I can draw your attention to the process at the
13 end of his tenure at Reed College.

14 When he tried to follow the procedures for requesting
15 accommodation, and every time he followed the college's own
16 directives from specific individuals, he was met with roadblocks
17 by other individuals in the college, namely professors who
18 didn't follow those procedures. And so when two professors came
19 to him and suggested that this entire situation could be
20 remedied if he explicitly told the committee on tenure what was
21 going on, then he followed that directive because he believed
22 this was the only opportunity for him to provide the college
23 with all of the information that it required so that his
24 situation with the college, vis-à-vis his degree, could be
25 reconsidered.

1 He followed their directives. They waited two years
2 to get back to him, and so equitable tolling is appropriate here
3 because of that.

4 And there's no -- there's no prejudice to Reed College
5 because they've had notice of this, this complaint, within the
6 statutory time -- within statutory time period, and they waited
7 until the statute of limitations ran out before they
8 acknowledged this complaint and asked for more information.
9 These are extraordinary circumstances, Your Honor.

10 THE COURT: Thank you very much, Ms. Nanau. I
11 disagree. I don't find extraordinary circumstances. I don't
12 find anything in the facts of this case that remotely satisfies
13 the requirements for tolling.

14 I dismiss claims 1 and 2 with prejudice for -- based
15 on the fact that the statute of limitations has expired.

16 Let's pick up claim 3 on breach of contract, and that
17 meaning the breach of contract claim against Reed.

18 I'll again turn to the moving party.

19 MS. BARRAN: Thank you, Your Honor.

20 The contract claim statute of limitations is of course
21 longer; it's a six-year statute in Oregon. This is basically a
22 failure to state a claim and failure to plead appropriately.

23 On the contract claim, there are several elements that
24 need to show up in the pleading, the first of -- one of -- the
25 first of which is an identification of what contract was

1 breached. And in this pleading, plaintiff provides a laundry
2 list of basically all school policies and procedures, asserts
3 that they're contractual, and then says that they were breached
4 in some sort of global way. There's no real identification of
5 which policy the plaintiff is talking about.

6 And secondarily, also missing from that complaint is
7 any indication from the plaintiff that he complied with his side
8 of the bargain.

9 So assuming that these policies are contractual, the
10 question is did he properly plead a contract claim? And our
11 request is that the Court dismiss the contract claim because he
12 did not.

13 We know specifically, taking the second one first,
14 that he has not met his end of the bargain because he failed his
15 thesis, he failed to produce a document that was appropriate.
16 His academic problems were not caused by Reed. He admits in his
17 papers that he lost his thesis document because of his own
18 negligence and carelessness.

19 He was given an opportunity to provide a substandard
20 draft and defend it. He didn't show up for his defense. He was
21 given a further extension of approximately one month, and he
22 failed to turn in that document on time.

23 THE COURT: You don't have to show his own breach.
24 You're just saying that the pleadings in the case don't allege
25 his own full performance and his own lack of breach; right?

1 MS. BARRAN: Correct.

2 THE COURT: That's the principal pleading failure
3 you're relying on here today?

4 MS. BARRAN: That, plus the failure to identify just
5 what policy requirements that are alleged to have been breached.
6 For example --

7 THE COURT: He identified policies. You're saying he
8 just didn't identify which policy within the broad policy, which
9 sub-policy is in play?

10 MS. BARRAN: Correct. Reed has many, many policies,
11 and they're all listed, but there isn't an indication of what
12 was breached. And I'll give you an example, Your Honor, that I
13 think illustrates this.

14 There is a complaint that you see mentioned two or
15 three times in the course of the pleading that says the sign-off
16 of his thesis document from December 2013 was revoked with
17 his -- without his ever having been given a reason for revoking
18 it contrary to the policies. I am clueless about what policies
19 require Reed to give a student some sort of information, the
20 reason for revoking a sign-off on a thesis that everybody agrees
21 was substandard. So I don't know what these policies are.

22 THE COURT: All right. Thank you.

23 And your response on breach of contract?

24 MS. NANAU: Your Honor, this is a motion to dismiss
25 and the standard is whether there are sufficient facts that have

1 been pled to make out a cognizable legal claim.

2 The plaintiff has alleged several specific college
3 policies that were breached; among them, the college's policy
4 that forbids plagiarism, the college policy that prohibits
5 sexual relations between professors and students, and college
6 policies regarding the thesis process. There is nothing in
7 those policies that permitted Reed to revoke the thesis approval
8 and require Andrew to submit a second manuscript. There is
9 nothing in those policies that permitted Reed to ignore his
10 complaint.

11 And the written complaint in 2015 was not the first
12 complaint that he made about Professor Szwarcberg Daby and her
13 inappropriate treatment of him.

14 THE COURT: Let's turn to the other argument, then,
15 the failure of plaintiff to plead his own full performance in
16 lack of breach. Do you have that in the complaint now?

17 MS. NANAU: Yes, it is in the complaint, Your Honor.
18 And if you permit me a moment, I can read you the specific
19 paragraphs in the complaint -- I was just looking over it -- but
20 it's going to take a moment for me to get there.

21 THE COURT: Go ahead.

22 MS. NANAU: Sorry, Your Honor. I'm a little nervous
23 and I'm not finding it.

24 The gist of what we said is that there were all of
25 these policies that bound Reed but also bound Andrew.

1 THE COURT: What were the obligations your client
2 undertook as part of this contract? What did the contract
3 obligate your client to do?

4 MS. NANAU: To satisfactorily complete his course of
5 study, to abide by the rules that were promulgated by the
6 college that pertained to students, and he fulfilled all of
7 those obligations to graduate but for the breaches that are at
8 issue in this case that -- that were -- sorry -- that
9 were -- the breaches of policies that Reed engaged in and
10 Professor Daby.

11 THE COURT: But you're unable to tell me where in the
12 contract this is alleged; in other words, here are the
13 obligations I undertook and I did them all?

14 MS. NANAU: Your Honor, there is language in the
15 pleading that states what Choi's obligations were to the college
16 pursuant to its own policies. And there is an allegation in the
17 pleading, but I'm sorry, I cannot find right this second, that
18 says he alleges that he complied with all of those obligations.

19 THE COURT: All right. Thank you very much.

20 Do you wish to reply, Ms. Barran?

21 MS. BARRAN: Just a few things, Your Honor.

22 Specifically in the complaint, plaintiff concedes that
23 he failed his thesis. But even setting the thesis aside, you
24 see allegations in the complaint that he failed to complete a
25 senior level political science course for Professor Gronke.

1 THE COURT: How do I know that's a term of the
2 contract incumbent on plaintiff that he failed to perform?

3 MS. BARRAN: Because the plaintiff says that he had
4 academic responsibilities and that they were part of his
5 completion of the coursework, and that's what Ms. Nanau just
6 argued. So we know that he didn't turn in his thesis, we know
7 that the thesis was required, we know that he failed to turn in
8 an examination, and he failed to turn in his political science
9 homework.

10 We also know from his letter to the two professors
11 that he -- and he confesses that he responded to their
12 assistance with dishonesty and a failure to be truthful with
13 them.

14 THE COURT: All right. Thank you.

15 I dismiss the breach of contract claim without
16 prejudice. Here's what I think is missing, and plaintiff has
17 two weeks to amend.

18 First, the amended pleading should set forth with
19 specificity what the terms are of the contract that impose any
20 obligation on plaintiff. That's the nature of a contract, of
21 course, that they have mutual obligations. So we should be able
22 to tell readily from the complaint what the terms are in the
23 contract that imposed some obligation of performance on
24 plaintiff.

25 And then assuming he can do so, the contract has to

1 allege that -- he has to plead his own full performance and lack
2 of breach.

3 That's the first thing that has to be amended. And
4 it's not -- it may be discernable in some rough way by parsing
5 the pleadings now, although I don't think so, but it's not the
6 least bit clear that that's the case.

7 Second, the plaintiff needs to identify when he
8 alleges a breach by Reed, what provision of the contract is
9 being breached. That's because the plaintiff has alleged a
10 far-flung set of documents as the contract, and it's -- while
11 it's not necessary to be line by line specific, one should be
12 able to read the complaint and tell what term of the contract is
13 being breached when one alleges a breach by Reed.

14 So if, for example, withdrawing approval is a breach
15 of the contract, then somewhere nearby when that breach is
16 alleged one should be able to tell what provision of the
17 contract is being breached.

18 So I dismiss claim 3 without prejudice to amend in two
19 weeks' time.

20 Claim 4 is negligent retention and supervision.

21 Again, I'll turn to the moving party.

22 MS. BARRAN: That's also a claim by Reed and it is a
23 claim against Reed.

24 There are two potential aspects to this, and I think
25 it's a little unclear in the complaint just how plaintiff

1 intended to structure this.

2 If plaintiff intends to say that there was negligence
3 in Reed up until the time that he failed and left the school in
4 January 24 [sic], then the timeliness arguments that we made
5 with respect to the first two claims apply here just as well.

6 As I understand the plaintiff's arguments, the
7 negligence claim is that, in 2015, the plaintiff sent a letter
8 to Reed complaining about those older events -- and the dean was
9 carbon copied on it, it wasn't directed to him -- and that the
10 dean was either not trained, with no detail, or unfairly or
11 improperly supervised with no detail and did nothing about the
12 letter, and, therefore, the plaintiff can't argue about what
13 happened to him at Reed up until 2014 by sending a letter in
14 2015 that wasn't acted on.

15 So assuming that that -- that I have the theory
16 correct, the events up until the time the plaintiff left Reed
17 are clearly untimely. It's a two-year statute of limitations.

18 If this is intended to be a claim for negligent
19 retention or negligent supervision, it's a state law claim with
20 very specific requirements. The plaintiff has to identify
21 foreseeable risk of harm, that he's part of the persons intended
22 to be protected by that. He has to show that there were known
23 dangerous propensities by the employee -- in this case, the
24 dean -- that they were foreseeable and that he could foreseeably
25 have harmed the plaintiff and the plaintiff was injured because

1 of that. None of that is present in this.

2 THE COURT: Can you pull the microphone closer to you.

3 MS. BARRAN: None of that is present in this
4 complaint, Your Honor. They say nothing about the dean other
5 than his name, he was carbon-copied on a letter, and then this
6 negligence claim flows.

7 What really is apparent here is an attempt to dress up
8 the old claim to see if they can escape the statute of
9 limitations, and for those reasons we would move to dismiss this
10 claim.

11 THE COURT: Are you making any argument about special
12 relationship, or not?

13 MS. BARRAN: We have cited cases about the lack of a
14 special relationship. So we are, Your Honor. There isn't any
15 recognition in this court as we sit here today that there's a
16 special relationship between this -- between this student and
17 between Reed College.

18 In this particular case, there clearly wouldn't be
19 one, even leaving aside whether or not the Court would recognize
20 one when he was a student. Remember that this letter was
21 written in 2015, at the end of 2015, October, written in
22 October, sent in November 2015. He had not been a student at
23 Reed since January 2014. So he was a person who was a former
24 student for Reed.

25 Under those circumstances, if this Court hasn't

1 clearly recognized a special relationship between a present
2 student and the institution, it certainly, we submit, would not
3 recognize a special relationship between a former student and
4 that institution.

5 So we would --

6 THE COURT: All right. Thank you.

7 For plaintiff, if you'd first identify whether this
8 claim is sort of a straight negligence claim for events that
9 occurred during the time your client was a student, or,
10 alternatively, a negligent retention claim for negligent
11 retention and training of a dean in the time period after your
12 client was no longer at Reed. Can you tell us which it is.

13 MS. NANAU: Sure, Your Honor. It's the latter. All
14 of -- because this -- all of the events regarding Nigel
15 Nicholson, who is the dean, and also the head of the committee
16 on tenure and advancement at Reed, because he's the dean of the
17 faculty, all of -- the claim is rooted in conduct that happened
18 after Andrew was no longer matriculated as a student but still
19 discussing a possible return to Reed. That's why he was still
20 in connection with various professors who encouraged him to
21 submit the complaint to the CAT.

22 THE COURT: So let's talk about just one element of
23 what you'd have to plead for that sort of negligent retention
24 claim, and that's the idea that since you're seeking only
25 economic damages, not physical harm, that you'd have to plead a

1 special relationship between a former student and Reed College.

2 Can you do that? Did you do that? Is that even possible?

3 MS. NANAU: Well, Your Honor, I think the special
4 relationship is a really fact-intensive inquiry, and I think
5 here we could do it.

6 I think I've alleged sufficient facts that are very
7 similar to the case of -- the *Shin* case, which involved a
8 student in a prep school. That student was 17 years old, living
9 at a boarding school, and the court found that there was a
10 proper relationship between that school and the student.

11 Similarly, the relationship that Andrew has with Reed
12 is informed by the special relationship that he had with them as
13 a result of him being a student there as a very young person.

14 THE COURT: Thank you.

15 MS. NANAU: And if he -- if I could just add one
16 thing, Your Honor.

17 He was complaining about something that required a
18 response and there was no response for two years, and that's the
19 root of the negligence claim here.

20 THE COURT: Thank you.

21 I don't get to make Oregon contract law. It has
22 requirements in it, and one of them here is, because of the
23 nature of the damages sought, that there be a special
24 relationship in this -- between the parties here.

25 Of course there are a number of relationships that are

1 accepted as special in case law or are obvious like
2 attorney-client or doctor-patient. Among the possible special
3 relationships, it's a little murky, and as counsel has
4 suggested, it can be very fact-specific with regard to whether
5 there's a school-student special relationship.

6 And I think that's certainly possible in the setting
7 of an elementary or secondary school. There are many elements
8 to that including, although it's not talked about this way as
9 much, as sort of an in loco parentis idea, but also just the age
10 and sort of shared child custody between parents and schools.

11 I think it, in my view, doubtful that one can
12 successfully advance a special relationship theory between
13 college students and their college or university since a lot has
14 changed by then, including age, but also including their
15 relationship to the age of majority and their parents and
16 otherwise.

17 Even, however, if there were a special relationship
18 between a college and a student, such as the college and the
19 student in this case, or the dean and the student here, that
20 wouldn't survive the end of the student-college or student-dean
21 relationship. It wouldn't apply to a former or ex-student.

22 And it doesn't really matter that he or she might be
23 contemplating returning. You can be in a special relationship
24 and then out of one and then get back in one as, for example,
25 when you have a lawyer and then you don't, and then you hire a

1 lawyer. But that doesn't endure for the interregnum. And so
2 that's missing here.

3 There are other things that are missing that are
4 pleading problems, but this isn't a pleading problem and this
5 one is insuperable, and, therefore, I dismiss this contract
6 claim -- excuse me -- this negligent retention claim with
7 prejudice.

8 I'll turn to the motion for summary judgment. We'll
9 turn to claim 5, the breach of contract alleged in that claim.
10 Start with the moving party.

11 MS. RUNKLES-PEARSON: Good afternoon, Your Honor.

12 The breach of contract here needs to fail. It's
13 fairly obvious from the pleading and from the briefing back and
14 forth that the contract that the plaintiff is alleging is
15 contained in an offer letter offering a stipend over the summer
16 called -- the so-called Corbett grant from Reed College to both
17 Professor Szwarcberg Daby on the one hand and the plaintiff on
18 the other hand.

19 These are two separate letters. I think there is a
20 question as to whether there's a contract at all, but the Court
21 doesn't need to decide that in order to decide this motion.

22 The plaintiff alleges that the breach of contract is
23 that Professor Szwarcberg Daby failed to provide attribution to
24 the plaintiff in three different works; one is her book, another
25 is a presentation that she made to the American Political

1 Science Association, and the third is in a book review that she
2 wrote of another professor's work that was published in an
3 academic journal.

4 The key issue here, Your Honor, is that there is
5 nothing in the contract, if indeed it is a contract, that
6 requires attribution by Professor Szwarcberg Daby. The contract
7 doesn't include any term requiring acknowledgment whatsoever,
8 and there's no term in it that might be ambiguous such that it
9 would allow extrinsic evidence that the plaintiff is seeking to
10 rely on in support of the response.

11 THE COURT: So your argument is that while the
12 extrinsic evidence might point to an idea that attribution is
13 something Reed College favors, that I should not turn to it
14 unless there's ambiguity in the terms of the contract itself,
15 and you contend there is no such ambiguity.

16 MS. RUNKLES-PEARSON: That's correct, Your Honor.

17 I have further evidence which has actually not yet
18 been presented to the Court that I would like to present to the
19 Court at this point if the Court would find it helpful.

20 Since the briefing closed on this case, we had the
21 opportunity to take plaintiff's deposition, and his deposition
22 testimony further supports our arguments in this matter.

23 THE COURT: I wouldn't do that if I thought the terms
24 were ambiguous; right?

25 MS. RUNKLES-PEARSON: Correct, Your Honor. However,

1 his deposition testimony does point out that he agrees that this
2 is the contract, and he further acknowledges that there is no
3 term in the contract that requires attribution.

4 THE COURT: The Corbett grant contract as alleged
5 appears to me to be between Reed and the grantees; right?

6 MS. RUNKLES-PEARSON: I think that that's a flaw in
7 the plaintiff's claim that we haven't addressed in this motion,
8 Your Honor. The letter itself is a letter from Reed -- two
9 letters. There's one from Reed to the plaintiff, and then there
10 is one from Reed to Professor Szwarcberg Daby. We think that
11 there is some oddness there that, should the Court allow this
12 claim to go forward, we would address in a future fuller motion.

13 However, that's not the basis of this motion. The
14 basis of this motion is that if there is a contract, it contains
15 no term requiring attribution.

16 THE COURT: Thank you.

17 For plaintiff?

18 MS. NANAU: Your Honor, the Corbett grant was for
19 collaborative work to be performed by Szwarcberg Daby and Choi.
20 There was no requirement for attribution because it was expected
21 because the work was collaborative in nature.

22 To accept defendant's arguments is to ignore the
23 purpose of the grant in and of itself and to ignore the plain
24 meaning of the word "collaborative" which means they did it
25 together.

1 THE COURT: Your argument is that "collaborative"
2 necessarily includes the concept of attribution?

3 MS. NANAU: Yes, Your Honor. Because if you're a
4 co-author and you're collaborating on a scholarly work, you are
5 entitled to attribution for your contributions to that work as a
6 co-author. And that is -- and that is enforced by the policies
7 of Reed College which should be informing the Court's view of
8 this because the policies are essentially like course of
9 dealing, and course of dealing is always taken into account when
10 terms of the contract are ambiguous, as they are here.

11 THE COURT: And the word you find ambiguous is
12 "collaborative"?

13 MS. NANAU: Well, no. I think "collaborative" -- the
14 fact that this was a collaborative research project informs the
15 parameters of the contract as it existed and what the
16 obligations were. The ambiguity is in that there is a reference
17 to attribution, but the reference to attribution is only limited
18 to Reed College in the contract.

19 So it's not actually correct that there is no
20 requirement for attribution. It only requires that the
21 attribution go to Reed College for providing funds pursuant to
22 the Corbett grant, which Defendant Szwarcberg Daby didn't do
23 either.

24 THE COURT: All right. Thank you.

25 Ms. Runkles-Pearson, your argument depends on the idea

1 that "collaborative" cannot be read to mean to include
2 attribution; right?

3 MS. RUNKLES-PEARSON: I think that's correct,
4 Your Honor. I think it needs to be read in the context of the
5 rest of the provisions of the contract, which, as counsel
6 pointed out, does include a statement specifically stating we
7 would appreciate any papers or publications resulting from this
8 work to include the foregoing or the following acknowledgement.
9 This research was supported by a Reed College collaborative
10 research grant.

11 I don't think that there's anything about the word
12 "collaborative" that requires attribution. I don't think that's
13 an ambiguous term. Furthermore, we have the plaintiff's own
14 testimony here that there's nothing in this --

15 THE COURT: Why would I rely on that unless I find the
16 word to be ambiguous?

17 MS. RUNKLES-PEARSON: That is true, Your Honor.
18 That's a backup argument, I suppose.

19 But I don't believe that the word "collaborative" is
20 ambiguous in any way. It certainly, at its farthest reaches,
21 implies that people work together; however, it does not imply in
22 any way that attribution must be provided.

23 Furthermore, even if the term were found to be
24 ambiguous, the surrounding information that we have here makes
25 it fairly obvious what plaintiff and Professor Szwarcberg Daby

1 anticipated. We've --

2 THE COURT: Surrounding information, you mean the
3 textual information in the grant? Or the deposition testimony?

4 MS. RUNKLES-PEARSON: I think both make that clear,
5 Your Honor. I think you can look solely at the language of this
6 contract and find that --

7 THE COURT: I'd look at the language in the contract,
8 the other language in the contract, as phase 1 to decide if it's
9 ambiguous. It's not a later phase. I don't just look at the
10 word "ambiguous," I look at the entire contract. That's phase 1
11 of contract analysis; right?

12 MS. RUNKLES-PEARSON: That's correct, Your Honor. And
13 I think as an initial matter, from the face of this contract
14 alone, you can conclude that there's no term requiring
15 attribution.

16 THE COURT: Thank you very much. I agree that the
17 term at least as employed in this particular contract is not
18 ambiguous and does not contain within it a requirement for
19 attribution. That's a separate concept that would have to have
20 been dealt with separately and isn't picked up by the concept of
21 collaborative work. And I find that just by the nature of the
22 term itself, but also by the term read in context of -- in
23 context of the entire contract, and therefore I grant summary
24 judgment as to claim 5 on the breach of contract for -- under my
25 reading of the actual terms of the contract itself.

1 Claim 6 is as to conversion, and Mr. Choi has conceded
2 that his conversion claim fails because an Oregon conversion
3 claim cannot apply to theft of intellectual property and in any
4 event would be preempted by copyright or patent law. So I
5 dismiss claim 6 with prejudice.

6 In all of this, I've left one claim subject to
7 amendment. I don't find any other amendment to be anything
8 other than futile here.

9 Mr. Choi wants to amend to state a claim under the ADA
10 and not Title 11 for disability discrimination, but that would
11 have the same statute of limitation and equitable tolling issue,
12 and wants to amend for declaratory relief against Ms. Szwarcberg
13 Daby in a variety of ways that aren't really what is intended by
14 the concept of declaratory relief. Instead, they are just
15 concepts picked up by my other rulings already on the pleadings
16 in this case.

17 So in two weeks we'll get an amendment on one of the
18 claims, and that's the only claim that has a possibility of
19 going forward, depending on how the amendment goes.

20 Thank you all. We'll be in recess.

21

22 (The proceedings concluded at 2:42 p.m.)

23

24

25

C E R T I F I C A T E

I certify, by signing below, that the foregoing is a true and correct transcript of the record, taken by stenographic means, of the proceedings in the above-titled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

DATED this 27th day of July, 2018.

RYAN WHITE
Registered Merit Reporter
Certified Realtime Reporter
Expires 9/30/2019
Washington CCR No. 3220
Expires 10/25/2018
Oregon CSR No. 10-0419
Expires 12/31/2020

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